

## STATE OF ILLINOIS

### ILLINOIS COMMERCE COMMISSION

**Nuon Acquisition Sub, Inc., Utilities, Inc.,** :  
**and Each of the 21 Illinois Operating** :  
**Subsidiaries of Utilities, Inc.** : **01-0480**  
:   
**Joint Application for Approval of Proposed** :  
**Merger.** :

### ORDER

By the Commission:

#### **The Procedural History**

On July 3, 2001, Nuon Acquisition Sub, Inc., ("NAS"), Utilities, Inc., ("UI") and each of its 21 Illinois Operating Subsidiaries of Utilities, Inc.<sup>1</sup> ("UI Operating Subsidiaries") (collectively, the "Applicants") filed a Joint Application with the Commission for approval of a proposed merger, in which, NAS will be merged with, and into, UI, with UI being the surviving corporation. The proposed merger will result in the parent company of NAS, nv Nuon, ("Nuon") acquiring indirect control over the UI Operating Subsidiaries.

Pursuant to notice as required by law and the rules and regulations of the Commission, this matter was set for hearing before a duly qualified Administrative Law Judge of the Commission at its offices in Chicago, Illinois on October 31, 2001. The Applicants appeared through counsel and presented the testimony of Carl Wenz, Vice President, Regulatory Matters for Utilities, Inc. in support of the Joint Application. The Staff of the Illinois Commerce Commission ("Staff") appeared through counsel and presented the testimonies of: Thomas Griffin, Accounting Department; William R. Johnson, Water Department; and Sheena Kight, Finance Department. At the

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<sup>1</sup> At the time the Joint Application was filed, the Commission had approved the acquisition by Utilities, Inc. of two additional operating subsidiaries, Holiday Hills Utilities, Inc., Docket No. 00-0763, and Westlake Utilities, Inc., Docket No. 01-0050, but those transactions had not yet closed. The acquisition of a third operating subsidiary, Wildwood Water Service Co., was pending in Docket No. 01-0187. As of the evidentiary hearing date, October 31, 2001, the Holiday Hills Utilities, Inc. and Westlake Utilities, Inc. transactions had closed, although Holiday Hills Utilities, Inc. has not yet filed tariffs, and those two subsidiaries are now UI Operating Subsidiaries, bringing the total of such subsidiaries to 23. The Wildwood Water Service Co. proceeding is still pending before the Commission. The updated status of these subsidiaries is noted in Applicants' Revised Exhibit A to the Joint Application. The evidence presented at the evidentiary hearing established that, if and when the Commission approves the transaction in Docket No. 01-0187 and that transaction is completed, Wildwood Utility Service Co. will become a UI Operating Subsidiary.

conclusion of the hearing on October 31, 2001, the record was marked "Heard and Taken".

## **Background**

NAS, a corporation duly incorporated under the laws of the state of Illinois, is a wholly-owned subsidiary of Nuon, a Dutch public company with limited liability. UI is a corporation duly incorporated under the laws of the state of Illinois with its principal office in Northbrook, Illinois; it is the parent company of all of the UI Operating Subsidiaries. Each of the UI Operating Subsidiaries is a corporation duly incorporated under the laws of the State of Illinois. All of the issued and outstanding shares of stock of each UI Operating Subsidiary are owned by UI. All of the UI operating subsidies are engaged in the business of providing water and/or sewer services to the public, and, therefore, they are "public utilities" within the meaning of Section 3-105 of the Public Utilities Act, 220 ILCS 5/1-101 *et seq.*, (the "Act") and is subject to the jurisdiction of the Commission.

None of the officers or directors of UI, or of the UI Operating Subsidiaries, owns any stock of NAS or Nuon. None of the officers or directors of NAS or Nuon owns any stock of UI or any UI Operating Subsidiary. No officer or director of any of these four companies has any interest in the proposed transaction within the meaning of Section 7-101 of the Act. Neither UI, nor any of the UI Operating Subsidiaries, have any officers or directors in common with NAS or Nuon.

## **The Proposed Reorganization**

UI entered into an Agreement and Plan of Merger ("Agreement") with Nuon and NAS. A copy of the Agreement was submitted in this proceeding as Exhibit B to the Joint Application.

The Agreement provides that at the effective time of the merger, NAS will be merged with, and into, UI. The outstanding shares of NAS stock will be converted to the right to receive cash and, upon such conversion, the stock will be canceled. As a result of the Merger, the separate corporate existence of NAS will cease and UI will continue as the surviving corporation, with Nuon as its parent company. At the effective time of the merger, all of NAS' rights, duties and obligations will continue with UI as the surviving corporation.

The Agreement further provides that the proposed merger will occur entirely at the parent company level. Therefore, the merger does not involve or require the sale, assignment or transfer of any property of the UI Operating Subsidiaries. The Agreement additionally provides that the UI Operating Subsidiaries will continue to hold all the licenses and authorizations they held prior to the merger. None of the rates, terms or conditions for the provision of water and sewer public utility services applicable to the UI Operating Subsidiaries, which are on file with, and approved by,

the Commission, will change as a result of the merger. Also, none of the operations, lines, plant, franchise or permits of the UI Operating Subsidiaries will be merged with the lines, plant, franchises or permits of any other company. Thus, no certificate of public convenience or necessity will need to be issued or cancelled as a result of the proposed merger.

### **The Legal Requisites**

Execution of the terms of the Agreement constitutes a “reorganization,” as is defined under Section 7-204(a) of the Act. Section 7-204(b) of the Act provides that in approving a reorganization, the Commission must find that:

- (1) the proposed reorganization will not diminish the utility’s ability to provide adequate, reliable, efficient, safe and least-cost public utility service;
- (2) the proposed reorganization will not result in the unjustified subsidization of non-utility activities by the utility or its customers;
- (3) costs and facilities are fairly and reasonably allocated between utility and non-utility activities in such a manner that the Commission may identify those costs and facilities which are properly included by the utility for rate-making purposes;
- (4) the proposed reorganization will not significantly impair the utility’s ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure;
- (5) the utility will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities;
- (6) the proposed reorganization is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction; and
- (7) the proposed reorganization is not likely to result in any adverse rate impacts on retail customers.

(220 ILCS 5/7-204(b)).

### **Impact on the Ratepayers**

Mr. Wenz testified that the proposed reorganization will not diminish the ability of the UI Operating Subsidiaries to provide adequate, reliable, efficient, safe and least-cost public utility service to the customers in the respective UI Operating Subsidiaries’ service territories. Mr. Wenz also testified that the reorganization will change only the

ownership of the UI Operating Subsidiaries' parent company; the UI Operating Subsidiaries will continue to rely on the same management. Mr. Wenz concluded that that therefore, the reorganization will be "transparent" to customers, regulators and employees. Thus, according to Mr. Wenz, the same level of service will continue after the merger. Staff witness Mr. Johnson did not dispute the Applicants' assertion that the merger would not have an impact on the UI Operating Subsidiaries' ability to continue providing adequate, reliable, efficient, safe and least-cost public utility services, as required by Section 7-204(b)(1).

### **Subsidization of Non-Utility Activities**

Mr. Wenz testified that that the proposed merger will not result in any subsidization of non-utility activities by the utility or by its customers. Staff witness Mr. Griffin testified that he agreed with Wenz' conclusion. The Commission notes that Mr. Griffin testified that the subsidiaries do not currently engage in non-utility activities, and, he testified that, should Nuon engage in non-utility activities, the allocation procedures currently in place and approved by the Commission would prevent cross-subsidization. Mr. Griffin concluded that the proposed reorganization will not result in the unjustified subsidization of non-utility activities by the utility or its customers and is in compliance with Section 7-204(b)(2).

### **Allocation of Costs and Facilities Between Utility and Non-Utility Activities**

Staff witness Mr. Griffin and Mr. Wenz both testified that, to the extent that there would be any costs associated with non-utility activities, the UI Operating Subsidiaries have allocation procedures that would serve as a reasonable means to guard against the unjustified subsidization of non-utility activities. Mr. Griffin recommended that the Commission find that costs and facilities should be fairly and reasonably allocated between utility and non-utility activities, so that the Commission may identify those costs and facilities which are properly included by the utility for rate-making purposes, in compliance with Section 7-204(b)(3). The Applicants agreed to Mr. Griffin's proposal.

### **Impact on Ability to Raise Capital and Capital Structure**

Mr. Wenz testified that the merger will not have a negative effect on the ability of UI, which is the entity responsible for raising capital for the UI Operating Subsidiaries, to raise necessary capital on reasonable terms or maintain a reasonable capital structure. Mr. Wenz stated that, after the merger, UI will continue to be responsible for raising capital and the merger, which will be effected by a stock transfer at the parent company level, will not have any impact whatsoever on the ability of UI to raise necessary capital on reasonable terms. Mr. Wenz also testified that the proposed merger would not change the current capital structure of the UI Operating Subsidiaries.

Staff witness Ms. Kight presented evidence regarding the financial implications of the proposed transaction. Ms. Kight stated that, as the owner of the capital stock of UI Operating Subsidiaries and the conduit through which they will access capital markets, UI must maintain a level of financial strength sufficient to raise capital on reasonable terms. She stated that she reviewed Utilities, Inc.'s pre-tax interest coverage, funds from operations interest coverage, total debt to total capital, and funds from operations to total debt ratios for 1999 and 2000. Ms. Kight testified that UI's resulting score for each ratio indicates that each ratio is at, or above, the benchmarks set by Standard & Poor's ratings agency for a credit rating of BBB. Ms. Kight also testified that the merger will not alter the UI Operating Subsidiaries' capital structure, and that the current capital structure of approximately 50% debt and 50% equity is reasonable. Thus, Ms. Kight concluded that UI's financial condition would remain sufficiently strong and, upon completion of the merger, UI's capital structure would remain unchanged. Ms. Kight opined that the proposed reorganization would not significantly impair the UI Operating Subsidiaries' ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure, as is required by Section 7-204(b)(4).

### **Remaining Subject to Illinois Law and Commission Jurisdiction**

Mr. Johnson testified, consistent with the testimony of the Applicants' witness Mr. Wenz, that all of the UI Operating Subsidiaries will continue to be subject to the jurisdiction of the Commission, and, therefore those subsidiaries would continue to be subject to all applicable laws, regulations, rules, decisions and policies governing regulated public utilities, as required by Section 7-204(b)(5).

### **Impact on Competition**

Mr. Wenz testified that Nuon does not offer any water or sewer services in Illinois and it is not authorized to provide such services in Illinois. Further, according to Mr. Wenz, Nuon has had no plans to enter the Illinois market. He concluded that therefore, the proposed merger will have no impact on competition in the water and sewer utility service markets in Illinois and the merger will not eliminate an actual or potential competitor in the water and sewer public utility services markets in Illinois. Mr. Wenz further testified that, in light of the fact that no competitor would be eliminated, no concentration in the industry would occur. Staff witness Mr. Johnson agreed with the testimony of Mr. Wenz; Mr. Johnson testified that the proposed merger would not have a significant impact on competition in those markets over which the Commission has jurisdiction, as required by Subsection 7-204(b)(6).

### **Adverse Rate Impact**

Mr. Wenz testified that the Applicants do not contemplate that there will be a rate increase as a result of the proposed merger. He stated that the Applicants do not seek the recovery of any merger-related costs. Mr. Wenz commented that the

Applicants do not seek approval for any legal entity, tariff, rate or financial consolidation. Mr. Wenz stated that approval of the proposed merger will have no impact on rates whatsoever. Noting the testimony of Mr. Wenz, Mr. Johnson testified that he saw no adverse rate impact on the customers, and he concluded that the Applicants have satisfied the requirements Section 7-204(b)(7). Mr. Griffin agreed with Mr. Johnson that there will be no adverse rate impact as a result of the merger

**Section 7-204(c) and Reorganization Costs**

Section 7-204(c) of the Act provides that the Commission:

shall not approve a reorganization, without ruling on (i) the allocation of any savings resulting from the proposed reorganization; and (ii) whether the companies should be allowed to recover any costs incurred in accomplishing the reorganization and, if so, the amount of costs eligible for recovery and how the costs will be allocated.

(220 ILCS 5/7-204(c)).

Mr. Wenz testified that the merger will occur entirely at the parent company level. He stated that therefore, Nuon has no corporate management presence in the United States. Wenz opined that there will be no duplication of functions as a result of the merger. Thus, no savings are expected to occur as a result of streamlined operations or the elimination of management redundancies. The anticipated cost savings as a result of the merger are therefore \$0. Mr. Wenz further testified that any unexpected merger savings that do occur will be passed on to ratepayers in future rate cases, as appropriate. Mr. Wenz also testified that the Applicants do not seek recovery of any merger-related costs.

Staff witness Mr. Griffin agreed with Mr. Wenz that merger-related savings are not likely to result from the proposed merger and that any unexpected merger savings should be passed on to the ratepayers. Mr. Griffin recommended that the Commission's Order specifically find that any unanticipated cost savings that could result from the merger will not increase the revenue requirement in future rate filings. Mr. Griffin also agreed that merger costs should not be recovered.

Finally, Mr. Griffin disagreed with Applicants' proposed accounting treatment of merger costs, submitted in response to a data request, that all costs be recorded in Account 675 "Miscellaneous Expense." Mr. Griffin stated that it is possible that some of those costs could be passed to ratepayers, if those expenses were recorded in that account. Mr. Griffin recommended that merger-related costs be recorded in Account 426, "Miscellaneous Non-Utility Expense." In rebuttal testimony, Mr. Wenz agreed with Mr. Griffin. Mr. Wenz stated that merger-related costs will be recorded in Account 426, "Miscellaneous Non-Utility Expense."

Mr. Griffin also requested that the Applicants provide a breakdown of their estimated merger costs, even though the Applicants do not seek to recover such costs from their ratepayers. In his rebuttal testimony, Mr. Wenz provided the following information:

Estimated Costs incurred by nv Nuon:

Financial and banking costs	\$5,000,000
Legal costs	1,500,000
Miscellaneous (filing fees, travel, etc.)	500,000

Estimated Costs incurred by Utilities, Inc.:

Goldman Sachs & Co.	\$4,000,000
Legal Fees	1,500,000
Accounting Fees	200,000
UI Personnel – Cap Time <sup>2</sup>	500,000
Compensation Related	6,500,000
Other	300,000

### Section 7-204A Information Requirements

Section 7-204A of the Act sets forth the information to be furnished in connection with certain applications for approval of reorganizations under Section 7-204. As detailed in paragraph 18 of the Joint Application and by means of the related exhibits, testimony and responses to data requests, the Applicants have provided the Commission with the information required under Section 7-204A.

### FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record, and being fully advised in the premises, is of opinion and finds that:

- (1) Each of the Utilities, Inc. Operating Subsidiaries is an Illinois corporation engaged in the business of providing public utility water and/or sewer service to the public in Illinois and, as such, is a public utility as defined by the Act;
- (2) the Commission has jurisdiction over the Utilities, Inc. Operating Subsidiaries;
- (3) the findings of fact and conclusions herein are fully supported by the record and are hereby adopted as findings of fact herein;
- (4) the Applicants have satisfied the information requirements of Section 7-204A;

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<sup>2</sup> Mr. Wenz testified that “UI Personnel – Cap Time” represents the amount of time UI employees spend on matters related to the merger; “cap time” is separately recorded because no recovery of the costs of such time will be sought from ratepayers.



- (5) the proposed reorganization satisfies the provisions in Sections 7-204(b)(1)-(7) of the Act as follows:
- (a) the proposed reorganization will not diminish the ability of Utilities, Inc.'s Operating Subsidiaries to provide adequate, reliable, efficient, safe and least-cost public utility service;
  - (b) the proposed reorganization will not result in the unjustified subsidization of non-utility activities by the Utilities, Inc., Operating Subsidiaries or their customers;
  - (c) costs and facilities are, and will be, fairly and reasonably allocated between utility and non-utility activities in such a manner that the Commission may identify those costs and facilities which are properly included by the Utilities, Inc. Operating Subsidiaries for rate-making purposes;
  - (d) the proposed reorganization will not significantly impair the Utilities, Inc., Operating Subsidiaries' ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure;
  - (e) the Utilities, Inc., Operating Subsidiaries will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities;
  - (f) the proposed reorganization is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction; and
  - (g) the proposed reorganization is not likely to result in any adverse rate impacts on retail customers.
- (6) the terms of the Agreement are reasonable and Nuon Acquisition Sub, Inc. should be authorized to merge with, and into, Utilities, Inc., with Utilities, Inc. being the surviving corporation and all current right, title and interest in and to all of the properties and assets of Utilities, Inc. shall continue with Utilities, Inc. after the merger;
- (7) any cost savings that result from the merger should not increase the revenue requirement in any future Utilities, Inc. Operating Subsidiary rate filing;

- (8) Utilities, Inc. should be authorized to make accounting entries on its books to reflect the merger, and it shall record merger costs in Account 426, "Miscellaneous Non-Utility Expense;"
- (9) the Utilities, Inc., Operating Subsidiaries should not be allowed to recover any costs incurred in accomplishing the proposed reorganization;
- (10) the anticipated cost savings from the proposed merger are \$0;
- (11) the Applicants' proposed reorganization should be approved and authorized; and
- (12) the Applicants should be authorized to perform any and all other acts which may be necessary or desirable to carry out the provisions of the Agreement.

IT IS THEREFORE ORDERED that the "Agreement and Plan of Merger" among nv Nuon, Nuon Acquisition Sub, Inc. and Utilities, Inc. be, and is hereby, approved.

IT IS FURTHER ORDERED that any cost savings that result from the merger will not increase the revenue requirement in any future rate filing of any Utilities, Inc. Operating Subsidiary.

IT IS FURTHER ORDERED that the rates, rules, regulations and conditions of service applicable to the service areas of the Utilities, Inc. Operating Subsidiaries shall remain the same as those currently on file with the Commission, until such time as any changes thereto are approved by the Commission.

IT IS FURTHER ORDERED that Utilities, Inc. is authorized to make the necessary accounting entries to reflect the merger of Nuon Acquisition Sub, Inc. with and into Utilities, Inc., and that merger costs be recorded in Account 426, "Miscellaneous Non-Utility Expense."

IT IS FURTHER ORDERED that the Utilities, Inc., Operating Subsidiaries are not allowed to recover any costs incurred in accomplishing the reorganization.

IT IS FURTHER ORDERED that pursuant to Section 7-204 of the Act, the Illinois Commerce Commission hereby approves the proposed reorganization of the Applicants.

IT IS FURTHER ORDERED that the Applicants are authorized to perform any and all other acts which may be necessary or desirable to carry out the provisions of the Agreement.

By Order of the Commission this 27<sup>th</sup> day of November, 2001.

Chairman